No. 78-354

In the Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF NORTH CAROLINA, PETITIONER

v.

WILLIE THOMAS BUTLER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

This case presents an important question concerning the legal standards governing waiver of the Fifth Amendment privilege against compulsory self-incrimination following receipt of the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Although this is a state prosecution, the statements at issue here were obtained by FBI agents acting in accordance with standard FBI procedures. Moreover, a substantial number of federal prosecutions involve the admis-

sion of statements freely made by a defendant after he has been advised of his *Miranda* rights. Accordingly, the United States has a direct and significant interest in the determination whether a defendant's express declination of the right to counsel is a necessary prerequisite to an oral waiver of *Miranda* rights.

QUESTION PRESENTED

Whether a defendant's decision to answer questions immediately after being advised of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), is nonetheless insufficient to establish a waiver of those rights in the absence of an express declination of the right to counsel.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT

Following a jury trial in the Superior Court of the State of North Carolina (Wayne County), respondent was convicted of kidnaping, armed robbery, and felonious assault, in violation of N.C. Gen. Stat. §§ 14-39, 14-87, and 14-32(a) (1969). He was sentenced to life imprisonment on the kidnaping and armed robbery counts and five years' imprisonment on the assault count, all sentences to run concurrently. The Supreme Court of North Carolina reversed the convictions and remanded for a new trial (Pet. App. A-1 to A-8).

The evidence at trial showed that at approximately 11:00 p.m. on December 28, 1976, respondent and a friend named Elmer Lee went to a gas station in Goldsboro, North Carolina, to buy beer. The attendant, Ralph Burlingame, told respondent and Lee that the station was closed, and the two men appeared to depart. However, as Burlingame left the station minutes later, respondent and Lee approached him with drawn guns and ordered him to drive them away in his automobile. Once inside the car, respondent informed Burlingame that they were going to rob and then shoot him. Burlingame immediately attempted to escape by leaping from the moving vehicle, but he was shot in the back as he jumped from the car. After they had stopped the car, respondent and Lee returned to the spot where Burlingame lay, stole his wallet containing $30, and each shot him again.[1] Although the attack left Burlingame paralyzed from the waist down, he survived and later identified respondent and Lee from a photographic array as his

[1] Ballistics evidence established that the bullets removed from Burlingame's back were fired from two different guns (R. 73).

assailants and testified in court that he was certain respondent was the man who had shot him (Pet. A-1 to A-2).

On the basis of a North Carolina fugitive warrant, FBI agents arrested respondent on May 3, 1977, in the Bronx, New York. The agents gave respondent the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and transported him to the FBI office in New Rochelle, New York. During this 15 minute drive, the agents did not ask respondent any questions related to the North Carolina incident and respondent did not make any statements (Pet. App. A-3; App. 2-5, 24-25, 29).

Upon arriving at the FBI office, Agents Richard Berry and David Martinez took respondent to an interview room and again advised him of his *Miranda* rights. After ascertaining that respondent had an eleventh grade education and that he was literate, the agents gave respondent the standard FBI "Advice of Rights" form and asked him to read it over and sign it.[2] Respondent read the form and told the

[2] This form (FD-395) reads as follows (Pet. 7):

"YOUR RIGHTS"

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time until you talk to a lawyer.

"WAIVER OF RIGHTS"

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed _____

agents that he understood his rights but that "he didn't want to sign this form and that he didn't want to sign anything." At that point, the agents again informed respondent that he did not have to talk with them or sign the form and that he could have an attorney present, but that they would like to ask him questions. Respondent replied: "I will talk to you but I am not signing any form." Respondent then made a number of incriminating statements that were later introduced at trial.[3] At no time during the interview did respondent request counsel or attempt to end the questioning (Pet. App. A-3 to A-5; App. 3, 5-6, 14-19, 20-23, 25-26, 30-31).

Respondent moved to suppress the incriminating statements made to the FBI agents on the ground that he had not waived his constitutional right to the presence and assistance of counsel (Pet. App.

[3] Respondent admitted that he and Lee had been drinking heavily and had decided to rob a gas station. Respondent claimed, however, that he had not participated in the actual robbery and that it was Lee who had shot the attendant (App. 6-7, 10-11, 12-13, 26-27, 31-32).

A-3). After an evidentiary hearing at which Agent Martinez's testimony concerning respondent's FBI interview was uncontradicted, the trial court found that respondent "understood his rights," "freely and voluntarily [spoke] to [the] agent after having been advised of his rights as required by the Miranda ruling," and "effectively waived his rights, including the right to have an attorney present during the questioning, by his indication that he was willing to answer questions" (App. 22-23). On appeal, the Supreme Court of North Carolina reversed. Relying upon this Court's statement in *Miranda* v. *Arizona*, *supra*, 384 U.S. at 470, that "[n]o effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given," the court below held that respondent's failure to sign the waiver card or expressly to decline the assistance of counsel precluded a finding of waiver on this record (Pet. App. A-5 to A-8).

SUMMARY OF ARGUMENT

In suppressing respondent's incriminating post-arrest statements to FBI agents, the Supreme Court of North Carolina held that, in the absence of a signed written waiver, an accused cannot waive the rights established by this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), without an express declination of counsel. But *Miranda* itself does not set forth any mandatory waiver procedure, much less hold that an accused must expressly state that he

does not wish to consult with an attorney before questioning may begin. Moreover, the unyielding waiver rule adopted by the court below would unduly hamper proper police investigative work and would upset the balance struck by *Miranda* between the protection of Fifth Amendment rights and the reasonable needs of law enforcement. As the Court repeatedly stated in *Miranda*, once a person in custody has been properly informed of his rights, the authorities may question him until and unless he indicates in some manner that he desires either to consult with counsel or to remain silent. The FBI agents complied with that command here.

In addition to constituting an unwarranted extension of *Miranda*, the decision below is inconsistent with a number of this Court's rulings involving the propriety of police procedures during custodial interrogation. In *Michigan* v. *Mosley*, 423 U.S. 96 (1975), for example, in upholding the admissibility of certain post-arrest statements made in the absence of an express waiver of the right to counsel, the Court noted only that the defendant had never asked to speak with an attorney. Indeed, the facts of this case present an even stronger instance of voluntary waiver, since respondent not only never indicated a desire to remain silent or to consult with counsel but also told the FBI agents that he would be willing to talk to them. The federal courts of appeals have unanimously agreed that, in similar circumstances, an accused may waive his *Miranda* rights without

signing a waiver form or expressly declining the right to counsel.

Finally, the *per se* rule applied by the court below is at odds with the "totality of the circumstances" approach to waiver problems long favored by this Court. The case by case analysis required by that approach is particularly appropriate to the circumstances of custodial interrogations, given the wide variety of situations in which such interrogation may occur. Here, without any suggestion of coercion, respondent affirmatively and deliberately chose to talk to the FBI agents immediately after acknowledging that he understood his rights. His subsequent statements were therefore correctly admitted at trial.

ARGUMENT

A VOLUNTARY WAIVER OF *MIRANDA* RIGHTS DOES NOT REQUIRE THAT THE ACCUSED EITHER SIGN A WAIVER OF RIGHTS FORM OR EXPRESSLY DECLINE THE RIGHT TO COUNSEL

A. The *Miranda* Decision Does Not Require An Express Declination of Counsel.

1. Prior to this Court's decision in *Miranda* v. *Arizona*, *supra*, the admissibility of a defendant's post-arrest statements principally involved consideration of whether such statements could be characterized as "voluntary." See *Michigan* v. *Tucker*, 417 U.S. 433, 441 (1974). Thus, insofar as constitutional doctrine was concerned,[4] the primary inquiry was

[4] Statutes or supervisory rules such as Fed. R. Crim. P. 5(a) tended to limit the instances of abuse in post-arrest interrogation in some jurisdictions. See *Miranda* v. *Arizona*, *supra*, 384 U.S. at 463.

whether the circumstances and techniques of custodial interrogation were so fundamentally unfair that the confession should be suppressed as a matter of due process. See, *e.g.*, *Haynes* v. *Washington*, 373 U.S. 503 (1963); *Watts* v. *Indiana*, 338 U.S. 49 (1949); *White* v. *Texas*, 310 U.S. 530 (1940); *Chambers* v. *Florida*, 309 U.S. 227 (1940); *Wan* v. *United States*, 266 U.S. 1 (1924).

In *Miranda*, the Court shifted the locus of constitutional protection against compelled confessions from the Due Process Clause to the Self-Incrimination Clause. *Miranda* v. *Arizona*, *supra*, 384 U.S. at 457; *Michigan* v. *Tucker*, *supra*, 417 U.S. at 443.[5] "To supplement this new doctrine, and to help police officers conduct interrogations without facing a continued risk that valuable evidence would be lost, the Court in *Miranda* established a set of specific protective guidelines * * *." *Ibid.* These now familiar rules require that "[p]rior to any [custodial] questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda* v. *Arizona*, *supra*, 384 U.S. at 444. Any statement obtained from a

[5] Two years earlier, in *Malloy* v. *Hogan*, 378 U.S. 1 (1964), the Court held that the privilege against compulsory self-incrimination was protected by the Fourteenth Amendment against abridgment by the states.

defendant during the course of custodial interrogation and prior to the complete recitation of these warnings is inadmissible, even though the statement may in fact be wholly voluntary. *Id.* at 444-445, 467-474. See *Michigan* v. *Mosley*, 423 U.S. 96, 99-100 (1975).[6]

Miranda, however, did not preclude all custodial interrogation. Rather, the Court attempted to strike a balance between the protection of Fifth Amendment rights and the reasonable needs of law enforcement. 384 U.S. at 479-486. Thus, the Court specifically stated on several occasions that once the accused has received the appropriate warnings, law enforcement authorities may commence their questioning until and unless he "indicates in any manner and at any stage of the process that he wishes to consult with an attorney * * * [or] that he does not wish to be interrogated * * *." *Id.* at 444-445; see also *id.* at 467-472, 473-474. Any statement elicited from the accused during such questioning may be introduced at trial, provided that the government sufficiently establishes that the accused waived his rights "voluntarily, knowingly, and intelligently." *Id.* at 444, 475-476, 478, 479. See, *e.g.*, *Michigan* v. *Tucker*, *supra*, 417 U.S. at 444.

[6] If a statement obtained in violation of *Miranda* is nonetheless found to be voluntary in the traditional sense, the prosecution may use that statement to impeach the defendant's contradictory testimony at trial. See *Mincey* v. *Arizona*, No. 77-5353 (June 21, 1978), slip op. 9-15; *Oregon* v. *Hass*, 420 U.S. 714 (1975); *Harris* v. *New York*, 401 U.S. 222 (1971).

2. This case focuses upon the circumstances properly constituting a voluntary, knowing and intelligent waiver of the right to remain silent, as construed and protected by this Court's decision in *Miranda*.[7] As noted above, the *Miranda* decision repeatedly recognized that after the authorities have effectively informed the accused of his *Miranda* rights they may question him until such time as he chooses to exercise either his right to remain silent or his right to consult with counsel (384 U.S. at 473-474; emphasis added and footnote omitted):

> Once warnings have been given, the subsequent procedure is clear. *If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege*; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. *If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.* At that time, the individual must have an opportunity to confer with the attorney and to

[7] The Court recognized in *Miranda* that the prophylactic rules established therein were not required by the Constitution. 384 U.S. at 467. See *Doyle* v. *Ohio*, 426 U.S. 610, 617 (1976); *Michigan* v. *Tucker*, *supra*, 417 U.S. at 444.

> have him present during any subsequent questioning. *If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.*

See also *id.* at 444-445, 467, 472.

Thus, if the accused has been informed of and understands his *Miranda* rights, his subsequent statements will be admissible unless he has manifested in some fashion an intent to exercise his Fifth Amendment rights. Where the accused asks for an attorney, affirmatively indicates that he does not wish to answer questions, or even stands completely silent under circumstances suggesting a decision to discontinue the interrogation, law enforcement officers must "scrupulously honor []" his decision by immediately terminating the questioning (384 U.S. at 479). See *Michigan* v. *Mosley*, *supra*, 423 U.S. at 103-104. On the other hand, where the government shows that the accused was fully aware of his *Miranda* rights and nonetheless responded to questions or offered a confession, there is no reason why those statements should not be used against the defendant even though he may not have signed a waiver form or otherwise prefaced his statements with an express oral waiver of his rights. See note 10, *infra*.[8]

[8] Of course, the refusal to sign a waiver form or to give an oral waiver may perhaps constitute a sufficient affirmative indication of the desire to assert Fifth Amendment rights so as to require a cessation of custodial questioning. As we discuss below (see Part B, *infra*), the trial judge must evaluate all of the relevant circumstances in determining the issue of waiver.

Here, the uncontradicted version of the events surrounding respondent's interrogation demonstrates that the FBI agents fully complied with both the rules established in *Miranda* and the standard FBI procedures that were expressly approved by the Court at that time.[9] The agents read respondent his rights on

[9] 384 U.S. at 483-486. The relevant portion of the current FBI policy provides as follows:

> 7-4 *WAIVER OF RIGHTS*
>
> Before a statement can be admitted into evidence, the Government must prove that the suspect fully understood the warnings and freely decided to answer questions. A suspect who remains silent after receiving warnings has not agreed to be questioned.
>
> 7-4.1 *Policy*
>
> (1) *Use of Form FD-395*—Inasmuch as the Government will have to meet a "heavy burden" in establishing that an accused knowingly and intelligently waived his rights, it is desirable that the subject's acknowledgment of the warnings and his waiver be obtained in writing. FD-395 should be used for this purpose. Completion of this form by the suspect provides documentary proof of both the warning and waiver of rights; consequently, the words of the full warning and waiver should not be repeated in the FD-302 reporting the results of the interview. State only the fact that the accused was warned of his rights and that he waived them, "as shown on an executed warning and waiver form"; this notation should appear immediately before the report's recitation of what the accused said in his statement.
>
> (2) *Signed Statement and FD-395*—If the subject waives his rights and is willing to furnish a written statement, the Agent may write or print "Statement" immediately below the waiver and then proceed to record the statement given. The words of the warning and waiver should not be repeated in the body of the statement. The completed statement should be signed and wit-

two separate occasions prior to any questioning and, upon ascertaining that respondent was literate, gave him the standard FBI advice of rights form to read (App. 3-4, 5-6, 15, 20-22, 25-26). Respondent read

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nessed at the bottom, and each page initialed by the subject.

(3) *Refusal to Sign FD-395*—If the accused is willing to waive his rights but will not sign Form FD-395, use the blank space on the form to record the language in which he indicated his willingness to waive (precise quotation if possible) and then execute the form in all respects other than his signature.

(4) *Refusal to Waive*—If the accused refuses to waive, the words and the fact of his refusal should be written in the blank space and the form should then be executed in all other respects.

(5) *FD-395; Impossible or Impractical to Use*—In any situation in which the written form is impossible or impractical to use, an acknowledgment of rights and a waiver of those rights can be obtained orally from the suspect. If FD-395 is not used, the justification therefor must be set out in the cover pages of the report setting forth the results of the interview. Although the oral warning and waiver need not be given in any particular form, they must conform substantially to the language found in FD-395. The testimony of the Agent that the warning was administered, that the suspect expressly stated his willingness to make a statement, and that he did not want a lawyer should suffice to carry the Government's burden.

In order to ensure the admissibility of statements made by an accused in custody, the FBI policy suggests that the agent obtain either a written waiver or an express oral waiver of the right to remain silent. Although such express waivers are not required by *Miranda*, proof of waiver is obviously facilitated where (as here) either form of express waiver is obtained. In contrast, the policy does not suggest that an agent attempt to obtain an express oral declination of counsel.

the form and acknowledged that he understood his rights (*ibid.*). The agents then asked whether he wished to sign the waiver form and whether he would consent to answer questions, even though he was not required to do so. Respondent replied that, although he would not sign the form, he would talk to the agents (Pet. App. A-4; App. 5-6, 15-17, 22, 26). He then proceeded to answer their questions (App. 6-7, 10-13, 26-27).

Despite this evidence, the Supreme Court of North Carolina held that respondent had not waived his rights because he had never signed the FBI waiver form or expressly declined the assistance of counsel.[10]

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[10] The court did not intimate that a signed or written waiver is always necessary. The federal courts of appeals have unanimously held that *Miranda* does not require such proof of waiver and that the fact that the accused refuses to sign a waiver form does not preclude a finding of waiver. See, *e.g.*, *United States* v. *Speaks*, 453 F.2d 966, 968-969 (1st Cir.), cert. denied, 405 U.S. 1071 (1972); *United States* v. *Boston*, 508 F.2d 1171, 1175 (2d Cir. 1974), cert. denied, 421 U.S. 1001 (1975); *United States* v. *Stuckey*, 441 F.2d 1104 (3d Cir.), cert. denied, 404 U.S. 841 (1971); *United States* v. *Thompson*, 417 F.2d 196 (4th Cir. 1969), cert. denied, 396 U.S. 1047 (1970); *United States* v. *Guzman-Guzman*, 488 F.2d 965 (5th Cir. 1974); *United States* v. *Caulton*, 498 F.2d 412 (6th Cir.), cert. denied, 419 U.S. 898 (1974); *United States* v. *Crisp*, 435 F.2d 354, 358 (7th Cir. 1970), cert. denied, 402 U.S. 947 (1971); *United States* v. *Zamarripa*, 544 F.2d 978, 981 (8th Cir. 1976), cert. denied, 429 U.S. 1111 (1977); *United States* v. *Moreno-Lopez*, 466 F.2d 1205 (9th Cir. 1972); *Bond* v. *United States*, 397 F.2d 162, 165 (10th Cir. 1968), cert. denied, 393 U.S. 1035 (1969); *United States* v. *Cooper*, 499 F.2d 1060, 1062-1063 (D.C. Cir. 1974). See generally Comment, *Waiver of Rights in Police Interrogations: Miranda in the Lower Courts*, 36 U. Chi. L. Rev. 413, 426-429 (1969).

In reaching this conclusion the court relied primarily (Pet. App. A-6) on the following passage from *Miranda* (384 U.S. at 470):

> An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given.

But this language, particularly when read in conjunction with the other portions of *Miranda* quoted above, establishes only that a waiver of the right to counsel during custodial interrogation cannot be presumed from the failure to request counsel prior to the recitation of the *Miranda* warnings.[11] Instead, a waiver of the right to counsel, like a waiver of the right to remain silent, can occur only after the required warnings have been given and the accused has been made aware of his legal rights.

3. Nor does the decision below effectuate the policies underlying *Miranda*. That decision reflects the

[11] The court also relied (Pet. App. A-6) upon another portion of *Miranda* that states that "[a]n express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver." 384 U.S. at 475. This portion of the opinion, which was, of course, unnecessary to the Court's decision, does not purport to limit the possible situations that could constitute a waiver. Especially in light of the other passages from *Miranda* quoted at length above, it cannot be said to mandate the result reached below.

judgment that custodial interrogation, even when carried out in compliance with the Due Process Clause, may be inherently coercive and therefore may tend to undermine the intelligent exercise of the self-incrimination privilege. 384 U.S. at 445-458. To offset the perceived coercion in such interrogation, this Court promulgated a series of warnings that must be administered by the police prior to commencing questioning. Therefore, the purpose of the *Miranda* rules is accomplished when the accused has been given the appropriate warnings and understands his rights. At that point, the coerciveness of the custodial interrogation has been substantially dispelled and the accused can make an informed decision to talk with his detainers.

The prophylactic rules announced in *Miranda* thus represent a careful accommodation of the rights of the accused and the reasonable and legitimate needs of law enforcement officials. By requiring that an accused make particular talismanic responses before his voluntary and uncoerced statements may be admitted in evidence, the court below has upset this balance. See *Fare* v. *Michael C.*, No. A-33 (July 28, 1978) (Rehnquist, Circuit Justice). While such technicalities may perhaps be appropriate in other contexts, such as the entry of a guilty plea, a detailed check list of specific questions and approved responses is impracticable and unwarranted in the context of a criminal investigation.[12] In sum, the in-

[12] Although the North Carolina Supreme Court did not require that the accused also state that he knew he could have

stant decision "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity * * *." *Michigan* v. *Mosley, supra,* 423 U.S. at 102.

B. A Rule Requiring Express Declination of the Right to Counsel as a Prerequisite of a Valid Waiver of *Miranda* Rights Conflicts with the Court's Post-*Miranda* Decisions.

1. Although this Court has never directly held that a person may waive his *Miranda* rights without specifically stating that he does not desire counsel, an analysis of several of the Court's post-*Miranda* decisions strongly suggests that the decision below constitutes an unwarranted extension of *Miranda.* For example, in *Michigan* v. *Mosley, supra,* the Court considered whether an accused's initial invocation of his right to remain silent concerning one crime precluded his subsequent waiver of that right when, after several hours, a different police officer gave him *Miranda* warnings for a second time and began to question him concerning an unrelated crime. In concluding that the statements made following the second warnings were admissible, the Court pointed out that the accused, like respondent, had never affirmatively indicated at any time that he desired to consult with counsel (423 U.S. at 97, 98, and 104 n.10). Nonetheless, the Court noted that "there is no

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an attorney appointed but that he still did not wish counsel, such a requirement is a logical extension of the court's insistance that the waiver be "specifically made" (Pet. App. A-7).

claim that the procedures followed during [the second] interrogation of Mosley, standing alone, did not fully comply with the strictures of the *Miranda* opinion." *Id.* at 98 (footnote omitted).[13] This conclusion is patently inconsistent with the holding below.

Similarly, in *Oregon* v. *Hass,* 420 U.S. 714, 715-716, 723 (1975), the defendant—like respondent—made several incriminating statements immediately after receiving *Miranda* warnings. During the course of the custodial interrogation, the accused remarked that he "was in a lot of trouble" and would like to telephone his attorney. The lower court held, and this Court appeared to assume, that the statements made prior to the moment that the accused affirmatively manifested an intent to exercise his right to counsel were admissible. *Id.* at 716, 723. In other words, an accused's *Miranda* rights are not violated until "the officer * * * continues his interrogation after the suspect asks for an attorney." *Id.* at 723. See also *Brown* v. *Illinois,* 422 U.S. 590, 594-595 (1975); *Frazier* v. *Cupp,* 394 U.S. 731, 738 (1969).

2. In suppressing respondent's statements, the North Carolina Supreme Court essentially established a *per se* rule concerning the waiver of *Miranda* rights: In the absence of a signed waiver, an accused will not be held to have waived his Fifth

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[13] Indeed, the Court indicated that it might have reached a different result if Mosley had actually indicated a desire for counsel. See 423 U.S. at 104 n.10.

Amendment rights[14] unless he states expressly both that he is willing to talk and that he does not desire the assistance of counsel. See also *State* v. *Blackmon*, 280 N.C. 42, 185 S.E.2d 123 (1971). Thus, not only does the decision below conflict with the relevant *Miranda* decisions of this and other courts,[15] but also its unyielding approach is conceptually at odds with the "totality of the circumstances" analysis that the Court has long applied in determining waiver questions. See, *e.g.*, *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938); *Frazier* v. *Cupp*, *supra*, 394 U.S. at 739; *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973); *United States* v. *Washington*, 431 U.S. 181, 188 (1977); *Brewer* v. *Williams*, 430 U.S. 387, 435-436

[14] Although some language in the court's opinion, and its quotation from *Carnley* v. *Cochran*, 369 U.S. 506 (1962), suggest that it considered the Sixth Amendment right to counsel to be implicated here (Pet. App. A-6, A-7), this case involves the Self-Incrimination Clause alone, as protected by *Miranda's* prophylactic rules. The Sixth Amendment "right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against" an accused. *Kirby* v. *Illinois*, 406 U.S. 682, 688 (1972).

[15] See, *e.g.*, *United States* v. *Stewart*, 585 F.2d 799 (5th Cir. 1978), petition for cert. pending, No. 78-6007; *Blackmon* v. *Blackledge*, 541 F.2d 1070, 1073 (4th Cir. 1976); *United States* v. *Marchildon*, 519 F.2d 337, 343-344 (8th Cir. 1975); *Hughes* v. *Swenson*, 452 F.2d 866 (8th Cir. 1971); *United States* v. *Ganter*, 436 F.2d 364, 369-370 (7th Cir. 1970); *United States* v. *Montos*, 421 F.2d 215, 224 (5th Cir.), cert. denied, 397 U.S. 1022 (1970); *Keegan* v. *United States*, 385 F.2d 260 (9th Cir. 1967), cert. denied, 391 U.S. 967 (1968). See note 10, *supra*.

& n.5 (1977) (White, J., dissenting).[16] And this case by case approach is equally appropriate to waiver analysis in the wide ranging circumstances of custodial interrogation.

Given the totality of the circumstances presented in this case, we believe that the trial judge correctly concluded that respondent knowingly and voluntarily waived his right to remain silent. Although respondent refused to sign a waiver card, that was but one fact among many to be considered by the judge.[17] A person who has just been arrested may decide not to sign anything for a variety of reasons other than a desire to remain silent,[18] and the courts of appeals

[16] With regard to the admissibility of confessions in federal prosecutions, the "totality of the circumstances" approach has been codified at 18 U.S.C. 3501(b).

[17] Conversely, the fact that a defendant signs a waiver form does not necessarily discharge the government's burden of proving a waiver. See *United States* v. *Cooper*, 499 F.2d 1060, 1062-1063 (D.C. Cir. 1974); *United States* v. *Hayes*, 385 F.2d 375, 377 (4th Cir. 1967), cert. denied, 390 U.S. 1006 (1968). In the absence of proof that the police obtained the signature by coercion or deception, the signed waiver form will establish a presumption that the accused waived his right to remain silent. See *United States* v. *Springer*, 460 F.2d 1344, 1349 (7th Cir.), cert. denied, 409 U.S. 873 (1972).

[18] The refusal to sign "may indicate nothing more than a reluctance to put pen to paper under the circumstance of custody. A detainee may still wish to discuss the matter with his detainers for any number of reasons, including a desire to exculpate or explain himself." *United States* v. *McDaniel*, 463 F.2d 129, 135 (5th Cir. 1972), cert. denied, 413 U.S. 919 (1973). See Comment, *The Refusal of an Accused to Sign a Written Miranda Rights Waiver Form After His Oral Affirmation of His Understanding of Those Rights Will Not Defeat a Showing of a Valid Waiver*, 43 Geo. Wash. L. Rev. 985 (1975).

therefore have unanimously held that the failure to execute a written waiver does not preclude a finding of waiver. See note 10, *supra*. Here, respondent was not coerced or tricked by the FBI agents, he acknowledged that he understood his rights (which had been explained to him twice and which he had read for himself), he explicitly remarked that he would be willing to talk to the agents, and he then freely answered the agents' questions without hesitation.[19] In short, respondent's statements were made "voluntarily, knowingly and intelligently" (*Miranda* v. *Arizona*, *supra*, 384 U.S. at 444), and the Supreme Court of North Carolina erred in holding that they were inadmissible at trial.

[19] The Court recognized in *Miranda* that the closeness in time between the warnings and the statements was a factor to be considered. 384 U.S. at 475. Respondent's admissions immediately followed his waiver.

CONCLUSION

The judgment of the Supreme Court of North Carolina should be reversed.

Respectfully submitted.

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